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IN THE SUPREME COURT OF THE
STATE OF UTAH

STATE OF UTAH,

Plaintiff and Respondent,

vs.

No. 12,091

JOHN CHARLES WILKS,

Defendant and Appellant

BRIEF OF APPELLANT

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FILED

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IN THE SUPREME COURT OF THE
STATE OF UTAH

STATE OF UTAH,

Plaintiff and Respondent,

vs.

JOHN CHARLES WILKS,

Defendant and Appellant

No. 12,091

BRIEF OF APPELLANT

Appeal from a verdict of Guilty to a charge of Assault With Intent to Commit Murder With a Revolver, and from the judgment and sentence imposed thereupon by the Honorable Maurice Harding, District Judge of the Fourth Judicial District of the State of Utah, in and for Utah County.

The appellant will hereinafter be referred to as the Defendant and the plaintiff and respondent will be referred to as the State.

STATEMENT OF FACTS

Defendant, John Charles Wilks, was charged in the Fourth District Court in and for Utah County, State of Utah, with the crime of assault with intent to commit murder with a revolver, allegedly committed on September 2, 1969, in Utah County, Utah, as follows, to-wit:

"Richard L. Maxfield, District Attorney for the Fourth Judicial District of the State of Utah, accuses John Charles Wilks of the crime of assault with intent to commit murder and charges that on or about the 2nd day of September, 1969, at Utah County, State of Utah, the said John Charles Wilks did assault Charles Warren with a revolver with intent to commit murder." (See information) To the charge contained in the information, the Defendant entered a plea of "Not Guilty", and the case was set to be tried before a jury on February 4 and 5, 1970. The trial was held in Salt Lake City, Utah, at the request of the Defendant in an attempt to obtain a more impartial jury, which said request was approved by the Court. At the conclusion of the trial the jury returned a verdict as to the Defendant of "Guilty of Assault With Intent to Commit Murder", (Tr. 141). On February 5, 1970, immediately after the conclusion of the trial and the rendering of the verdict to the jury, the Defendant waived any time for the pronouncing of the judgment (Tr. 142). Whereupon, the Judge sentenced the Defendant to confinement in the Utah State Prison for an indeterminate term of not less than 5 years nor more than life. (Tr. 143).

Upon the trial of the case the State called as witnesses Richard Floyd Duke, a Springville police officer (Tr. 7), Clair Rasmussen, highway patrolman (Tr. 27), Dr. Chester B. Powell (Tr. 33), Mr. Mack Holley, Utah County Sheriff Deputy (Tr. 102), Mr. Nelson S. Evans, highway patrolman (Tr. 128), and Mr. Roy Helm, Assistant Superintendent of Utah Highway Patrol (Tr. 131). The Defendant called as witnesses Rudolph Lopez Moreno by reading into the record the transcript of the hearing called for the purpose of taking said testimony (Tr. 57), and the Defendant, John Charles Wilks (Tr. 74).

From the evidence introduced it appears without substantial conflict that during the day of September 2, 1969, Defendant, John Charles Wilks, was driving a vehicle north on the freeway toward Springville, Utah County, Utah, with Rudolph Lopez Moreno as a passenger in the front right seat of the car at a time when there was a .22 caliber pistol and a knife on the front seat between the driver and the passenger. (Tr. 59) The gun had been in the possession of both the Defendant and the passenger Moreno. (Tr. 60) Defendant and his passenger discovered that they were being followed by a highway patrol car, and they turned off the freeway toward Springville, Utah, on the street known as 400 South Street, they being aware that the patrol car had followed them approximately three miles. (Tr. 69) When the Defendant discovered that the patrol car was following him off the freeway, he pulled the car over to the side of the road as he was proceeding east on 400 South in such a position as to have the two right wheels of the car Defendant was driving off the paved portion of the highway, with a patrol car being driven by Officer Charles Warren stopping behind the Defendant's car a distance of approximately 15 or 16 feet. Officer Duke, the Springville policeman, proceeded by radio call on 400 South Street toward the Defendant's car, crossed over and stopped in front of the Defendant's vehicle a distance of approximately 12 to 15 feet by adding the length of the front of the car driven by Officer Duke to the driver's seat, (Tr. 13) and at a time when the Defendant's car had completely stopped. (Tr.11) Officer Duke was carrying a .357 Colt Magnum Pistol. (Tr. 11). Officer Warren, from his car parked behind Defendant's car, got out of the patrol car a distance of approximately 2 to 3 feet from the left side of his car toward the paved portion of the street. Officer Warren cautiously approached Defendant's vehicle, raised his right hand to his hip and unsnapped

his gun and placed his right hand on the butt of his gun, motioning Defendant to come toward Officer Warren with Officer Warren's left hand at a time when Officer Duke thought Officer Warren was motioning for Officer Duke to proceed and come forward. (Tr. 12) The pistol in the car of the Defendant was a .22 caliber single shot pistol. (See Defendant's Exhibit IV).

At this point the testimony is in conflict. Officer Duke at the time of the trial testified that he stopped 8 to 10 feet in front of suspect's vehicle; (Tr. 10, line 24) that Defendant's car was stopped in such a position that the right wheels were just off the paved portion of the road; (Tr. 10, line 28) that Officer Warren was approximately 2 to 3 feet away from his left front door toward the center of the road when he motioned for the Defendant to come out of the car; (Tr. 11, line 19) that as Defendant leaned out of his car, two shots rang out, Officer Warren was falling with his gun still holstered; (Tr. 13, line 18) that Officer Duke was standing behind his left front door when he heard the shots ring out, unholstered his gun and fired one shot at the Defendant; (Tr. 14) that Defendant returned Officer Duke's fire and then Officer Duke in turn returned three more shots at the Defendant, after which time Defendant jumped from his car on the left side and ran away from Officer Duke and between the Defendant's car and Trooper Warren's vehicle and out into a field; (Tr. 14) Officer Duke, after Defendant had run into the field, saw Officer Warren wipe his forehead with his handkerchief. (Tr. 16) Officer Duke did not see the .22 caliber single shot pistol in Defendant's hand at any time. (Tr. 19) Officer Duke testified that the first two shots were one right on top of the other. (Tr. 19) Officer Duke testified that one of his shots ricocheted off the left front door of Defendant's car and one ricocheted off the hood of Defendant's

car into the windshield. (Tr. 20) Officer Duke stated that when he saw Officer Warren in the road, Officer Warren's head was 15 feet to 18 feet from the left front door of Defendant's car, and that Officer Warren was from 7 to 8 feet from Defendant when the first two shots were fired. (Tr. 26, 27) After the first shot was fired by Officer Duke, Warren had dropped out of Officer Duke's sight. (Tr. 23)

Officer Rasmussen testified that as he approached the scene from a distance of about two blocks, he saw Officer Warren standing at the left of his vehicle. (Tr. 28) Officer Rasmussen was driving at a high rate of speed at the time he first saw Officer Warren standing to the left of his car with Warren's hands on his hips and his right hand being near his weapon; that he saw Officer Warren go down at a time when he heard only one shot, and Officer Warren did not draw his revolver. (Tr. 29) Officer Rasmussen stopped his car behind Trooper Warren's and fired three times at the Defendant running into an open field. (Tr. 30)

Dr. Chester B. Powell testified upon examining Officer Warren in Salt Lake City that he found two circular wounds approximately $\frac{3}{4}$ of an inch apart on the right forehead toward the temple, appeared to be bullet wounds and wounds of entry, and he found no wounds of exit. (Tr. 35) Dr. Powell performed surgery on the head of Officer Warren, and with the suction tube removed a blood hemorrhage plus a number of small bullet fragments. (Tr. 37) Dr. Powell further testified that the two holes in Officer Warren's head were approximately $\frac{1}{4}$ of an inch in diameter, about $\frac{3}{4}$ of an inch apart, and they looked to Dr. Powell like they might have been made by a .32 sized bullet. (Tr. 38) At Tr. 39, the District Attorney asked Dr. Powell as follows:

Line 8, Page 39: "Doctor, previous testimony has

indicated that Trooper Warren took his handkerchief from his pocket and wiped his forehead and put his handkerchief back into his pocket after this injury. Is that possible? Is that something normal with an injury of this type?"

Answer: "Yes. It would have been possible. But it would have had to occurred within 20 or 30 seconds from the injury. After that, I don't think he would have been conscious or able to have done any voluntary movement."

Line 17, Page 39: "Do you have an opinion as to whether his condition at that time would have allowed him to have fired his gun?"

Answer: "Not unless he had fired it before he had sustained the gunshot wound himself."

Dr. Powell testified that the bullet fragments removed from the head of Officer Warren were not large enough to identify the size of the bullet that had been fired, and that the little fragments were about 1/16 of an inch in diameter. (Tr. 41) The District Attorney asked Dr. Powell whether or not Officer Warren could now remember the events of the shooting. Dr. Powell testified that Officer Warren was "unable to recollect any events when I have asked him, and I would not expect his to have recollected the circumstances." (Tr. 43) After Dr. Powell had testified as to the nature and extend of the injuries of Officer Warren and over the strenuous objection of Defendant's counsel which was made off the transcript record and between the Court and all counsel but which is made a part of the record under Defendant's motion for new trial, Trooper Warren was permitted to be brought into the courtroom sitting in a wheelchair. (Tr. 44) Dr. Powell then proceeded to demonstrate on the head of Officer Warren sitting in the wheelchair the general area where th holes occurred, but were not visible to anyone in the court-

room and to which Officer Warren could not and did not make any response. (Tr. 44) Dr. Powell testified over the strenuous objection of Defendant's counsel of lack of foundation for the testimony, and no evidence of measurements of the calculation that the bullets retained in the head of Officer Warren could either be a .22 deformed or a .32, but that he did not think it would be larger than a .32. (Tr. 46) On cross-examination Dr. Powell testified that when bullets strike a skull very strange things happen, that they become distended, might explode, break in two, that it is possible for one bullet that is split in two to make the two holes in the head of Officer Warren, and that there was no way of determining whether there was more than one bullet track through the brain of Officer Warren. (Tr. 47) Dr. Powell further testified on cross-examination that the X-rays taken were not specifically to determine the size of the object that still remained in the head of Officer Warren. (Tr. 48)

After the testimony of Dr. Powell the State rested. At that time defense counsel made a motion out of the presence of the jury for the Court to direct a verdict in favor of the Defendant. This was at a time when the Defendant's gun had not been offered into evidence and that the only evidence was that the Defendant was seen running from the scene with the gun in his hand. (Tr. 51, 52) The Court denied the motion. Defendant's counsel requested after the denial of the motion that the State produce Officer Warren's gun for the Defendant's case and that Defendant would put on testimony to the effect that Officer Warren's gun had, in fact, been fired more than once. The Court did not rule upon Defendant counsel's request for the production of Warren's gun. (Tr. 53, 54).

At the commencement of the Defendant's case, Moreno,

through his deposition, testified that after Wilks had stopped the car, Moreno heard Warren request Wilks to get out of the car and motioned Wilks with his hand to come out; that Officer Warren unleashed his holster with Warren's right hand. (Tr. 61). Moreno testified that Moreno then gave Wilks the .22 caliber pistol telling Wilks that the officer was probably after the gun, handed Wilks the gun, Wilks took it with his right hand, opened the car door, heard Wilks say "don't" or "don't shoot" or "don't, wait," and then heard shots fired. (Tr. 62). Moreno testified that he could not see who was shooting, but that it was not Wilks that fired the first shot because he could tell if the shot was coming from inside the car. (Tr. 663). Moreno testified that the gun was cocked when he handed it to Wilks, and that Moreno had shot the pistol along the highway from the car as they proceeded north and before the shooting of Officer Warren in question. (Tr. 64). Moreno testified that a bullet missed him from the back. (Tr. 66).

Defendant Wilks took the stand on his own behalf and testified that Officer Warren's car was 8 to 10 feet behind the rear of Defendant's car. (Tr. 79). That Springville officer's car was approximately 6 to 8 feet in front of the front of Defendant's car. (Tr. 81). That as Wilks started to stand up in getting out of the car, Warren went for his gun, pulled his gun, and shot at Wilks while Warren was in a crouch. (Tr. 81, 82, 83). Wilks testified that one shot was fired and he was struck by it in the hand. (Tr. 83). That Wilks' gun did not intentionally go off, and that after Warren had shot once, Wilks' gun discharged once. (Tr. 85). Wilks testified that the one shot from his gun that was fired was fired as he was falling back into the car, and that Wilks' gun discharged almost immediately or just a couple of seconds after Officer Warren had shot. (Tr. 88). Wilks identified State's

Exhibit IV as being the same type of gun that he had, a .22 caliber pistol, and demonstrated before the Court that to fire Exhibit IV you had to manually pull back the hammer with your thumb to cock the gun. (Tr. 88, 89). Wilks testified that there were three and no more than four unspent cartridges in the .22 caliber pistol at the time that he had it in his hand when he got out of the car. (Tr. 90). Wilks testified that Officer Warren was approximately 12 to 15 feet from Wilks when Warren fired at Wilks. (Tr. 93). Wilks testified that he took the gun out of the car with him to give it to Officer Warren, and that Wilks did not aim the gun at Officer Warren or anyone else. (Tr. 92).

After Defendant had rested, State called Officer Holley in rebuttal. Officer Holley identified a mark on the left front door of the Defendant's car as illustrated in Exhibit VI that a bullet had apparently glanced off the door into the air which had been fired from in front of Defendant's car. (Tr. 106). A photograph entered as State's Exhibit XIII was examined by Officer Holley and testified that there was one hole in the windshield of Defendant's car and testified that he examined and found three entrance holes into the windshield and two exit holes. (Tr. 109). Officer Holley testified that two shots entered the Defendant's car from the rear of the Defendant's car. (Tr. 111). Officer Holley testified from Exhibits IX and XI that he found two bullets that had been fired into the back of the Defendant's car. (Tr. 111). Officer Holley testified as to evidence of a split slug, and that a shot that entered the Defendant's car from the rear was fired in a line that Warren would have been in at the time. (Tr. 112). Holley testified that a bullet fired from behind was a .38 caliber bullet. (Tr. 115). Holley further testified that he found no powder residue or burns inside the Defendant's car evidencing any firing from inside the car. (Tr. 118).

At the conclusion of this witness, the Defendant, out of the presence of jury, once more made a motion for directed verdict, which the Court denied. (Tr. 137). After said motion and out of the presence of the jury, the Court and all counsel reviewed the prepared instructions of the Court and at that time Defendant objected to said instructions and the failure of the Court to give Defendant's requested instructions, including an instruction that there was not sufficient evidence to support the conviction of the offense charged, a necessary instruction on the intent necessary of the Defendant to be guilty of the offense, and the Defendant took due exception of the refusal to give said instructions.

STATEMENT OF POINTS

POINT I

THE COURT ERRED IN PERMITTING OFFICER WARREN TO APPEAR BEFORE THE COURT OVER STRENUOUS OBJECTION OF DEFENDANT WHEN NO USEFUL PURPOSE WOULD BE SERVED AND PURPOSE WAS TO AROUSE SYMPATHY AND INFLAME JURY AGAINST DEFENDANT.

POINT II

THE COURT ERRED IN REFUSING TO DIRECT A VERDICT AT THE CONCLUSION OF THE STATE'S CASE; THERE WAS NOT SUFFICIENT EVIDENCE TO PROVE DEFENDANT'S GUILT BEYOND A REASONABLE DOUBT.

POINT III

THE COURT ERRED IN PERMITTING DR. POWELL TO TESTIFY FOR THE STATE AS TO THE CALIBER OF THE BULLET IN OFFICER WARREN'S HEAD.

POINT IV

THE COURT ERRED IN FAILURE TO GIVE THE DEFENDANT'S REQUESTED INSTRUCTION NUMBERS 2, 10, 11 AND 13.

POINT V

THE COURT ERRED IN GIVING INSTRUCTION NUMBERS 6, 7, AND 12.

ARGUMENT

POINT I

THE COURT ERRED IN PERMITTING OFFICER WARREN TO APPEAR BEFORE THE COURT OVER STRENUOUS OBJECTION OF DEFENDANT WHEN NO USEFUL PURPOSE WOULD BE SERVED AND PURPOSE WAS TO AROUSE SYMPATHY AND INFLAME JURY AGAINST DEFENDANT.

In the testimony of Dr. Powell, witness for this State, the Dr. testified as to the size of the holes in the head of Officer Warren, the surgical procedures that he performed and on page 42, line 18 of the transcript, Dr. Powell testified "his wound has healed well." Dr. Powell further testified as follows:

Tr. 43, line 23: "Yes. he is unable to recollect any of the events when I ask him, and I would not expect him to have recollected the circumstances."

Subsequent to this testimony, the State requested permission from the Court to bring in Officer Warren. After Officer Warren was before the Court, the District Attorney interrogated Dr. Powell as follows:

Tr. 44, line 9:

Question: "Doctor, I have in the courtroom Trooper Warren. Could you explain to the jury and show them on his skull where the points of entry were?"

Answer: "There is a large scar here, a curved scar, which is the surgical incision. This irregularity is where the bone was removed. And the two wounds are here on the right side of the forehead at this point (indicating). They have become quite pale, and you can barely see them. You can see them clearly enough here and here (indicating)."

The above testimony was not essential in proving any controverted issue before the Court. The defense had not controverted the fact that there were two holes in the head of Officer Warren, the officer could not testify by reason of the traumatic spell of amnesia as the doctor had testified, and the bringing in of Officer Warren served no useful purpose to assist the Court or the jury in determining facts already established, except for the purpose of inflaming the sympathy of the jury against the Defendant to see the pathetic officer in his wheelchair. Everyone present in the courtroom, including counsel, the Court, and the jury, could feel the emotions of everyone in the courtroom at the time and during the time Officer Warren was present in the courtroom.

In Volume 2 of Wharton's Criminal Evidence, Page 631, states as follows:

"It is permissible to exhibit to the jury scars and wounds on a person's body *when a demonstration of this nature tends to solve any controverted issue in the case. When the character and extent of physical injury is in question*, it is proper to produce the party and to illustrate the manner of receiving and the nature and extent of the wounds"

"Scars may always be exhibited, it seems, as evi-

dence bearing upon an issue as to the seriousness of the wounds by which the scars were produced, or the manner in which such wounds were inflicted. However,, such an exhibition should not be permitted if it is not relevant to an issue in the case, or if the scars are not shown to have resulted from the encounter which is the subject of the criminal charge, or if the scars are not entirely the result of the wounds inflicted by the accused, but are in part the result of a surgical operation."

In the case of *State of Montana vs. Cockrell*, 309 P.2d 316, the Montana Supreme Court ruled as follows:

"Wounds received or scars left in commission of a crime are admissible *if they tend to solve some controverted issue.*"

In the case of *State vs. Bischert*, Montana, 308 P.2d 969, cited in *State vs. Campbell*, Montana, 405 P.2d 978, 22 ALR 3rd 824, the Montana Court said as follows:

"When the purpose of an exhibit is to inflame the minds of the jury or excite the feelings rather than to enlighten the jury as to any fact, it should be excluded."

Such is the case before this Court, and this was, in fact, the effect of the bringing of Officer Warren into the courtroom.

In *Graves vs. State*, Nevada, 1968, 439 P.2d 476, the Court said as follows:

"Whether evidence of nature and extent of injury to victim of attempted murder is of such an inflammatory nature as to outweigh its probative value and preclude its admission is within sound discretion of the trial court."

In the case of *State vs. Jensen*, Oregon, 296 P.2d 618. the Oregon Court held as follows:

“In a capital case, evidence which might shock jurors’ sensibilities is not for that reason inadmissible, but to bring into case wholly irrelevant evidence of gruesome character merely for purpose of exciting feelings of hate on part of jury against defendant would be indefensible and intolerable.”

In *STATE vs. POE*, 1969, 21 Utah 2d 113, 441 P 2d 512, the Supreme Court of Utah was faced with the issue as to whether or not the Trial Court had used its discretion in admitting into evidence colored-slides made of victim during the course of autopsy and permitting them to be displayed to jury by means of slide projector and screen. The Court in reversing the judgment and remanding it for a new trial held as follows:

“Initially, it is within the sound discretion of the Trial Court to determine whether the inflammatory nature of such slides is outweighed by their probative value with respect to a fact in issue. If the latter they may be admitted even though gruesome. In the instant case they had no probative value. All the material facts which could conceivably have been adduced from a viewing of the slides had been established by uncontradicted lay and medical testimony. The only purpose served was to inflame and arouse the jury.”

The Utah Supreme Court cited *OXENDINE vs. STATE*, 335 P 2d 940, Oklahoma and 73 ALR 2d 802 as authority for the above ruling. The *OXENDINE vs. STATE OF OKLAHOMA* case held as follows:

“If principal effect of demonstrative evidence such as photographs is to arouse the passion of the jury and inflame them against the defendant because of the horror of the crime, the evidence must be excluded, although, if the evidence has probative value with respect to a fact in issue that outweighs the

danger of prejudice to the defendant, the evidence is admissible even if it is gruesome and may incidentally arouse the passions of the jury."

In the case before this Court there was not a controverted issue before the Court to be served by Officer Warren being brought into the court room. The pointing out of the surgical scar was not material to the issues of the case; there was no probative value in the testimony. There was no controverted issue in the case that the officer was shot, no controverted issue that there were two holes in the officer's head nor size of the holes in Officer Warren's head. There was a controverted issue as to the caliber of the bullet that struck the officer, but the bringing of Officer Warren into the Court room did not go to that issue and did not assist the Court nor the jury in determining that issue. The only purpose and affect of bringing Officer Warren into the court room was to inflame the minds of the jury or excite their feelings rather than to enlighten them as to any fact and this was the very real effect that was accomplished in the court room at that time. Defendant earnestly submits that the Trial Court abused its discretion in admitting Officer Warren into the court room when in fact, said appearance served no useful purpose.

POINT II

THE COURT ERRED IN REFUSING TO DIRECT A VERDICT AT THE CONCLUSION OF THE STATE'S CASE; THERE WAS NOT SUFFICIENT EVIDENCE TO PROVE DEFENDANT'S GUILT BEYOND A REASONABLE DOUBT.

The State failed as a matter of law to prove beyond a reasonable doubt that the Defendant assaulted Officer War-

ren with a revolver with the intent to commit murder. At the conclusion of the State's case, there was no evidence that the Defendant had shot and hit Officer Warren, there had been no gun identified for that purpose. One of the officer witnesses for the State testified he heard two shots purportedly fired by Defendant, one immediately after another in rapid fire succession, and another officer witness of the State testified that as he approached the scene there was only one shot fired. The physical facts are such that the .22 caliber pistol in evidence could not be fired rapid fire, was a single shot weapon that had to be cocked after each shot, and there is a very pronounced reasonable doubt as to the physical ability of anyone to fire the alleged .22 pistol under the distances and circumstances surrounding the facts of the case in the manner in which the State's witnesses testified. It is physically impossible for such a weapon to be fired as the State's witnesses testified. The facts are uncontroverted that Officer Warren was in direct line with the fire of Officer Duke. (See Exhibit XIII) that bullets were ricocheting around and about Defendant's car, that bullets had, in fact, split. There was no evidence, although the doctor had removed some of the bullet fragments from the head of Officer Warren, as to whether the fragments had come from the .22 caliber bullet or a .357 or .350 caliber pistol. There were no identifying fingerprints or marks upon the gun that was finally introduced after the State had rested. The State's witnesses did not testify that they saw any gun in the hand of Defendant Wilks at any time during the shootings that took place. The State's witnesses, in the State's case, testified that Officer Warren had not drawn his gun and had fired no shots, when the physical evidence introduced in Defendant's case clearly showed that shots had been fired from the direction in which Officer Warren has been and into the back of Defendant's

car and through the windshield of Defendant's car which were not made by any caliber pistol the size that Defendant had had possession of. If you completely disregard the testimony of the witnesses for the Defendant and just examine the physical evidence before the Court, as a matter of law there was not sufficient evidence beyond a reasonable doubt to prove the Defendant guilty of the offense charged.

In the burden of proving a crime, the State has the burden of proving every essential element of the crime beyond a reasonable doubt. State vs. Hendricks, Utah, 1953, 258 P.2d 453; State vs. Laris, Utah, 1931, 2 P.2d 243. In instruction No. 8, the Court instructed as to the elements of the crime as follows:

Instruction No. 8:

"The material allegations of the crime of assault with intent to commit murder as charged in the information are as follows:

1. That on or about the 2nd day of September, 1969, the Defendant made an assault on Charles Warren.
2. That the assault, if any, was made with a loaded revolver which the Defendant held in his hand.
3. That the assault, if any, was made without just cause or excuse and with intent to murder Charles Warren.
4. That the Defendant then and there had the present ability to accomplish the death of Charles Warren."

The evidence of the State and in the State's case did not produce any evidence to prove element No. 2 in the above instruction; the evidence of the State's case did not prove element No. 3 in the above instruction. There was no evidence in the State's case that the Defendant had a loaded revolver

in his hand except that shots were heard by Officer Duke. Officer Duke testified that he heard there were two shots, and Officer Rasmussen, approaching from the west, heard one shot. There is physical evidence in the photographs before the Court that there were at least two holes in the rear of the Defendant's car and at least one exiting through the windshield that was made of a caliber bullet that the officers were using, and that was not in the possession of the Defendant. There is no evidence of a premeditated or intentional aiming of the gun in any manner with the necessary intent to murder. Even if you entirely disregard the witnesses for the defense, the physical evidence in the State's case do not carry the burden of proof necessary in a criminal matter, beyond a reasonable doubt, as required by law.

POINT III

THE COURT ERRED IN PERMITTING DR. POWELL TO TESTIFY AS TO THE CALIBER OF BULLET IN OFFICER WARREN'S HEAD.

Dr. Powell testified on direct examination in part as follows:

Tr. 38, line 9:

"Question: Doctor, were you able to tell the size of the holes, these holes that you mentioned of entry?"

Answer: Yes, the two holes were approximately $\frac{1}{4}$ of an inch in diameter. About $\frac{3}{4}$ of an inch apart, and they looked to me like they might have been made by a .32-size bullet. And I put that down on my emergency room report, that they suggested a .32 caliber bullet, and I put a question mark, because I wasn't entirely sure."

"Question: Are you familiar with the different sizes of bullets, .32, .22, .3, .357, etc.?"

"Answer: Yes."

"Question: Do you have an opinion as to whether or not this size of hole—strike that. Have you, in your work, had occasion to examine other gunshot wounds?"

"Answer: Many."

"Question: And based upon your training and experience, do you have an opinion as to whether or not this hole could have been caused by a shell larger than a .32?"

"Answer: Yes."

"Question: What is your opinion?"

"Answer: No, it could not have been. It could have been a .32 caliber bullet hole, but it was too small to be larger than a .32 caliber."

"Question: Could it have been a .357 Magnum?"

"Answer: No."

"Question: Could it have been a .22?"

"Answer: Yes, it might be."

Tr. 44, line 20:

"Question: Doctor, based on these two wounds, the shell fragment to the back of the skull, do you have an opinion as to how many bullets entered the skull?"

"Answer: Yes."

"Mr. Christensen: If your Honor please, we object to his answering. He doesn't know where these were fired from, or how these were fired, or if there was a split slug, for instance. I think he could testify that there are two holes. There are probably two projectiles. But whether or not they were two separate bullets, I don't think he is confident and has enough knowledge to express his opinion, and we object to him so doing."

"The Court: The objection will be overruled."

"Question: You may answer, doctor."

"Answer: There were two wounds of entry which were identical. Both appeared to be bullet wounds of entry. One large fragment is still within the head, and is a bullet which has been altered by striking something, it is irregular. The other small fragments may or may not, may be fragments of this ont bullet, or could be fragments of a second bullet which exploded. There are three possibilities, and I couldn't differentiate between the two possibilities on the base of the medical evidence."

"Question: Now you say the holes are similar. Do you mean the same size?"

"Answer: The same size, the same appearance."

"Question: And do you have an opinion, doctor, as to the caliber of the bullet that remains there, based upon its size from the X-ray."

"Mr. Christensen: If Your Honor please, if he has got an opinion, he may answer yes or no."

"Witness: It is my opinion that—

"Mr. Christensen: If Your Honor please, I object to his testifying. He has shown no foundation as to how he determined what the size is. There is nothing in the record to show any basis or any foundation for such an opinion. We object to it."

"Mr. Maxfield: Your Honor, the doctor has testified that he is familiar with the different caliber weapons. He has seen many bullet wounds of this type. We feel that he is qualified to tell the different calibers by the size. I think he is qualified to answer the question."

"The Court: The objection is overruled, he may answer."

"Mr. Christensen: May I make one observation, Your Honor?"

"The Court: Yes, you may."

"Mr. Christensen: I further object on the grounds that there is no indication how the measurements were made, from what basis he has made his calculation or determination, and I think there is no foundation laid."

"The Court: The objection will be overruled, he may answer."

"Mr. Maxfield: You may answer, doctor."

"Answer: Judging from the appearance of the bullets still retained, this could be either a .22 deformed, or a .32. But I don't think it would be larger than a .32."

Question: Were any fragments taken out or any portions of bullets large enough that the caliber of the bullets could be ascertained?"

"Answer: No."

"Mr. Maxfield: No further questions. Do we have any further need of Mr. Warren?"

"By the Court: Do you have any further need, Mr. Christensen?"

"Answer: No, Your Honor."

"Question: Mr. Taylor?"

"Answer: No, Your Honor."

"The Court: Very Well, he may be taken out of the courtroom."

Tr. 47— Cross-Examination, line 5:

"Question: Dr. Powell, you, of course, have no knowledge as to how the projectiles got into the head, other than the fact that they were there, other than the evidence that you have seen?"

"Answer: That is correct."

"Question: You say that the projectile is still there, you think it could be a .22 or possibly a .32. It

could be a fragment of a .357, could it not, as far as you know?"

"Answer: That would be a remote possibility. It appears to be a somewhat deformed bullet of a smaller caliber."

"Question: But isn't it true, doctor, that when a bullet strikes the skull very strange things happen to it?"

"Answer: Correct."

"Question: Distended, it may explode. A lot of things could transpire in respect to it?"

"Answer: Correct."

"Question: That would also be true, would it not, Doctor, if the bullet struck an object before it entered the head. It might break it in two or split it in two?"

"Answer: Yes."

"Question: So that it could, in fact, be one bullet that is split in two that made these two bullets?"

"Answer: That would be a possibility."

"Question: Is there any way of determining whether there is more than one bullet track through the brain, doctor?"

"Answer: No."

"Question: These X-rays from which you have testified, doctor, I take it were taken by you?"

"Answer: They were taken by my order by the X-ray department."

"Question: Were they taken with the specific thought in mind of measuring the size of the object that you located in the brain?"

"Answer: They were taken with the object of learning what we could about the injury, and whether there were bullets in the head, and if so, where. Whether there was a fracture, or any other detail we could determine."

“Question: But were they specifically taken to determine the size of the object as it actually is in the head?”

“Answer: No.”

The above portion of the transcript is the evidence concerning the alleged size of the piece of metal in Officer Warren's head at the present time. The Court will note there has been no foundation laid for the doctor's ability to discern and determine the size and caliber of bullets, other than the one question that he is familiar with sizes and has examined bullet wounds. The testimony of the doctor himself is such that the two holes in the head of Officer Warren could have been made by one bullet split in two. The evidence before the Court was that shots were being fired from Officer Duke's gun, a .357 Magnum bullet, some of the shots being armor piercing ammunition. Officer Warren was in the direct line of fire of Officer Duke. Defendant submits to the Court that there was not sufficient foundation laid by the State for Dr. Powell to testify as he did.

POINT IV

THE COURT ERRED IN REFUSING TO GIVE DEFENDANT'S REQUESTED INSTRUCTIONS NO. 2, 10, 11, AND 13.

Defendant's requested instruction No. 2 defines the words “unlawful and unlawfully”, “deliberate”, “premeditate”, “intent”, and “specific intent”. These terms and definitions are essential in instructing the jury as to the elements of the crime charged. These definitions are properly defined under the law. Defendant's requested instruction No. 10 is as follows:

Instruction No. 10:

"Under the law of this State, every person who with intent to commit murder, commits an assault upon the person of another is guilty of assault with intent to commit murder. An assault is an unlawful attempt coupled with the present ability to commit a violent injury on the person of another. Before you can convict the Defendant, John Charles Wilks, of the crime of assault with intent to commit murder, you must believe from the evidence and beyond a reasonable doubt that the State has established each and all of the following propositions:

1. That on or about September 2, 1969, the Defendant made an assault upon Charles Warren with a revolver in Utah County, State of Utah.
2. That at the time of the making of such assault, the Defendant specifically intended to murder the said Charles Warren.
3. That the Defendant then and there had the present ability to accomplish the death of Charles Warren.

If the State has failed to prove any one or more of the foregoing elements by evidence which convinces you beyond a reasonable doubt, then I charge you, members of the jury, that it is your duty to find the Defendant not guilty of the crime of assault with intent to commit murder.

If the State has proved to your satisfaction beyond a reasonable doubt each and all of the elements above mentioned and set out, then I charge you that the Defendant is guilty of assault with intent to commit murder as is charged in the information." Defendant's requested instruction No. 11 is as follows:

"If you believe from the evidence that Defendant, John Charles Wilks, accidentally, or unintentionally fired or discharged a revolver in his hand and without a specific intent to either assault or kill Charles Warren, then you are hereby directed to find

the Defendant not guilty of the offense charged in the information."

Defendant's requested instruction No. 13 is as follows:

"You are instructed that if from all the evidence you find that Defendant's gun accidentally or unintentionally discharged and without a specific intent to murder or a specific intent to do great bodily harm, then you are directed to find the Defendant not guilty."

The foregoing instructions requested by the Defendant but refused by the Court state with clarity the Defendant's theory and defense in this case. State of Utah vs. Gillian, 1970, 23 Utah 2d 372, 463, P. 2d 811. It was the theory and defense of the Defendant in this case that the gun accidentally and unintentionally discharged; that one of the chief and primary elements of the offense charged was that there had to be a specific intent in the mind of the Defendant to murder Officer Warren at the time of the discharge of the Defendant's gun. The circumstances of the Defendant, being surrounded by two police cars, the fact the Defendant was being fired at by the officers, the physical evidence of the improbability of being able to accurately fire a single shot, non-automatic .22 caliber pistol all substantiate the Defendant's theory and defense in this matter. The failure to give the above instructions wiped out Defendant's theory of defense.

76-30-1, U.C.A., 1953, defines murder as follows:

"Murder is the unlawful killing of a human being with malice aforethought."

76-30-2, U.C.A., 1953, defines "malice" as follows:

"Such malice may be expressed or implied. It is expressed when there is manifested a deliberate intention unlawfully to take the life of a fellow creature. It is implied when no considerable provocation

appears, or when the circumstances attending the killing show an abandoned and malignant heart."

76-30-14, U.C.A., 1953, is the offense charged in the above case which is as follows:

"Assault with intent to murder. Every person who assaults another with intent to commit murder is punishable by imprisonment in the State Prison for a term of from five years to life."

The Utah Supreme Court in the case of State vs. Minousis, 228 Pac. 574, is a Utah case in which the defendant was charged with the crime of assault with intent to commit murder. The Court held as follows:

"In order to convict one charged with assault with intent to commit murder, there must exist in mind of accused specific intent to take life of person assaulted."

"Specific intent to take life of person assaulted may be proved by circumstantial as well as direct evidence and may be inferred by acts and conduct of accused, nature of weapon, and manner of its use, together with all other circumstances in the case."

In the above case the facts were such that there was a prolonged period of time in which the guards of the mine in Carbon County and the workers had confronted each other during the day; that there were prolonged belligerent attitudes between the parties as well as uncomplimentary remarks exchanged between them; there was evidence of heated debate between the parties, a conduct of following the individual shot and direct evidence on the shooting itself, a witness having seen the gun in the hand of the defendant as it shot the person assaulted. The facts of the case before this Court do not show any premeditation, conduct warranting deliberation, and the direct evidence that was in the Minousis case.

In the case of State vs. Buchanan, Idaho, 252 P. 2d 524, in a case involving assault with intent to commit murder, the Idaho Court stated as follows:

"Whether a specific intent to murder existed in mind of accused is a question of fact to be determined by jury from all the evidence and the inferences to be drawn therefrom, and it is not a matter of legal presumption."

"*Specific* intent to kill is an essential ingredient of offense of assault with intent to murder, and such intent may generally be inferred from the unlawful use of deadly weapon, PROVIDED IT WAS USED IN A WAY TO INDICATE INTENTION TO KILL."

The instructions given by the Court did not require and define with clarity the specific intent in the mind of the Defendant necessary and as an essential element of the offense. The jury did not have an opportunity under the instructions given and the failure of the Court to give the requested instructions to determine whether or not there was a specific intent in the mind of the Defendant to kill Officer Warren. Under the instructions given the jury did not have to find and did not determine whether there was a specific intent required.

In the case of State of Utah vs. Peterson, 1969, 22 Utah 2d 377, 453 P.2d, 696, the Court had before it the crime of assault with a deadly weapon with intent to do bodily harm. The Court there cites the above stated Minousis case. In the Peterson case the facts were such that there was direct evidence that the defendant had a hunting knife in his hand, made a slashing motion toward the injured party and, in fact, cut the injured party. The Court found and ruled that the defendant is presumed to intend the natural and probable consequences of his acts, and that the acts were sufficient to prove the crime without proving the thoughts of the defendant at the time the

act occurred. In the case now before this Court there is not sufficient evidence to prove the premeditation and specific intent. There is not even direct evidence that the Defendant, in fact, hit and struck Officer Warren. Dr. Powell testified that the caliber of the bullet that struck Officer Warren was a .32 caliber, and this evidence was given without a sufficient basis or foundation to allow the testimony of Dr. Powell as to expertise on this ballistic testimony.

POINT V

THE COURT ERRED IN GIVING INSTRUCTIONS NO. 6, 7, AND 12.

A portion of the Court's instruction So. 6 is as follows:

(b) "An assault with intent to commit murder is an unlawful attempt, coupled with an ability."

The above instruction and the portion stated herein, is contrary to law in that it did not indicate to the jury that the Defendant must have had an intent to commit murder as an element of the charge made against him.

Defendant excepts to instruction No. 7 given by the Court which is as follows:

"Murder is the unlawful killing of a human being, with malice, aforethought.

The words malice or maliciously, as used in the foregoing definition of murder and elsewhere in these instructions denote a wicked intention of the mind; an act done with a depraved mind and attended with circumstances which indicate a wilful disregard for the rights or safety of others.

The word 'afterthought' means only that the intent must precede the act as distinguished from afterthought. 'Afterthought' does not imply deliberation or

the lapse of considerable time.

As used in connection with murder, 'malice' may be either expressed or implied.

Malice is expressed when there is an intention unlawfully to kill a human being.

Malice is implied (1) when the killing results from an act involving a high degree of probability that it will result in death, which act is intentionally done for a base, anti-social motive, and with wanton disregard for human life.

The term 'malice' does not necessarily imply a pre-existing hatred or enmity toward the person killed."

The above instruction is contrary to law in that it erroneously makes reference to a killing, which is not an evidentiary fact in this case, in that no death occurred. This instruction is inappropriate for the charge made against the Defendant and distorts the instructions insofar as the necessary intent on the part of the Defendant, which is a matter of proof to be made by the State.

Defendant excepts to instruction No. 12 given by the Court which is as follows:

"The specific intent to commit murder may be proved by circumstantial as well as by direct evidence. Such intent may be inferred from the acts and conduct of the Defendant, the nature of the weapon used and the manner of its use, all considered in connection with the other circumstances present in the incident in question.

A person is presumed to intend the natural and probable consequences of his acts. However, this presumption may be rebutted by evidence introduced at the trial."

The above instruction unduly stresses circumstantial evidence as permitting a finding of guilty wherein the Court fully

and adequately instructed the jury as to this matter in instruction No. 17.

CONCLUSION

In conclusion the Court committed prejudicial error in permitting the State to bring Officer Warren into the court room when no useful purpose was served; there was not a controverted issue before the Court concerning Officer Warren which justified his appearance before the Court and when he could not and did not testify. The very real and dramatic affect in the court room was to arouse sympathy for the officer and the State and inflame the jury against the Defendant and this inflammatory appearance in conjunction with the other error herein stated dramatically and prejudicially affected the jury. The State did not prove the necessary elements of the crime charged beyond a reasonable doubt and the Court erred in refusing to direct Defendant's motion for a directed verdict at the conclusion of the State's case; the State specifically failed to prove that the Defendant shot and hit Officer Warren. The facts and surrounding circumstances did not prove beyond a reasonable doubt the specific intent of the Defendant which was necessary as one of the elements of the crime beyond the necessary reasonable doubt standard. The Court prejudicially erred in permitting Doctor Powell to testify as to the caliber of the bullet in Officer Warren's head in that the Doctor admitted that the X-rays taken were not taken for the purpose of measuring the object, admitted that the bullets do split, explode and other unusual results when they hit a human head; the State did not lay a sufficient foundation as a matter of law to permit the Doctor to testify as to the caliber of the object in the head of Officer Warren; the physical evidence itself substantiated the fact that the caliber of

bullet in Officer Warren's head was larger than the caliber of the pistol in the possession of the Defendant. Defendant's Requested Instruction Numbers 2, 10, 11 and 13 were necessary and according to law with regard to the essential elements of the crime charged; the said Requested Instructions described accurately Defendant's theory of the case and Defendant was prejudicially denied his lawful right to have his theory presented before the jury; the crime of assault with intent to commit murder requires a specific intent to commit murder at the time of the discharge of Defendant's gun; the failure of the Court to give Defendant's Requested Instructions 2, 10, 11 and 13 in conjunction with giving of the Court Instruction Numbers 6, 7 and 12 prejudiced the Defendant in the minds of the jury. The Court erred in giving the Court Instruction Numbers 6, 7 and 12, they were contrary to law in that they did not indicate to the jury that the Defendant must have had a specific intent to commit murder and said instructions erroneously makes reference to a killing which is not evidencial fact in this case in that no death occurred; these said Instructions unduly stressed circumstantial evidence as permitting a finding of guilty. Defendant respectfully submits to the Court that the above errors were prejudicial and directly influenced the jury adversely against the Defendant and that there certainly was a reasonable doubt as a matter of law. Consequently the verdict of the jury below and the judgment thereupon should be reversed.

Respectfully submitted,
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